

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

OHIO & VICINITY REGIONAL
COUNSEL OF CARPENTERS
(Graycor, Inc.)

and

CASE 9-CB-12498

BRYAN WEST, an Individual

*Catherine Terrell, Esq., and
Eric A. Taylor Esq.,
for the General Counsel¹
Donald J. Mooney, Jr., Esq.,
for the Respondent.²
Bryan West, pro se*

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. The dispute in this case centers around the filing of internal union charges against Bryan West (West or Charging Party West) by an agent of the Ohio & Vicinity Regional Counsel of Carpenters (Union) on January 27, 2010 and imposing a fine against West on November 6, 2010. The Acting General Counsel (Government) of the National Labor Relations Board (Board) alleges the fine was imposed by the Union against West because he filed an unfair labor practice charge on July 17, 2008 against the Union with the Board in Case 9-CB-12012. The case originates from an unfair labor practice charge filed with the Board by West, on March 21, 2011 against the Union. The prosecution of this case was formalized on May 31, 2011, when the Regional Director for Region 9 of the Board, acting in the name of the Board's Acting General Counsel, issued a complaint and notice of hearing (complaint) against the Union.

¹ I shall refer to counsel for the Acting General Counsel as counsel for the Government and to the Acting General Counsel as the Government.

² I shall refer to counsel for the Respondent as counsel for the Union and I shall refer to the Respondent as the Union.

Specifically the complaint alleges the Union, through its agent David Wilkerson, on or about January 27, 2010 filed an internal union disciplinary charge against West charging West with “causing dissension among the members.” It is further alleged that on November 6, 2010 union members Dale Lawson, Chris Howell, John Lamb, Jeremy Kuhar and Kevin Ennis were appointed to a trial committee to preside over the internal union disciplinary charge brought against West and that the Trial Committee allowed evidence of the 2008 unfair labor practice charge, Case 9-CB-12012, filed with the Board, to be admitted at the disciplinary hearing as evidence to support the “causing dissension among members” allegation. The Trial Committee found West guilty and imposed a \$1,250 fine. It is alleged the Union’s actions violate Section 8(b)(1)(A) of the National Labor Relations Act, as amended (the Act).

The Union, in a timely filed answer to the complaint, denied having violated the Act in any manner alleged in the complaint.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. I carefully observed the demeanor of the witnesses as they testified. I have studied the whole record, the posttrial briefs, and the authorities cited therein. Based on more detailed findings and analysis below, I conclude and find the Government did not establish jurisdiction and even if it did the Union did not violate the Act in any manner alleged in the complaint.

FINDINGS OF FACT

I. LABOR ORGANIZATION STATUS, AGENCY STATUS AND JURISDICTION.

The parties admit, and I find, the Union is a labor organization within the meaning of Section 2(5) of the Act.

The Government alleges in its amendment to the complaint that a number of individuals were agents of the Union. The Union admitted, as correct, the titles and positions of those named in the amendment to the complaint but denied any were agents of the Union within the meaning of Section 2(13) of the Act. I find it necessary, and/or helpful, to only address the agency status of Executive Secretary-Treasurer Robert Peto; Business Agent, Delegate and Local Union President David Wilkerson; and, Union Trial Committee members Dale Lawson, Chris Howell, John Lamb, Jeremy Kuhar and Kevin Ennis. First, I consider the status of Peto, who according to Wilkerson, oversees the daily operations and provides direction for everyone in the Ohio & Vicinity Regional Council of Carpenters including delegates to that body as well as its business agents in Ohio and portions of Kentucky and West Virginia. Peto selects members for union trial committees and holds himself out to the public as an official of the Ohio & Vicinity Regional Council of Carpenters. Applying the common law principles of agency, I find the evidence establishes Peto is an agent of the Union within the meaning of Section 2(13) of the Act. Second, I consider the status of Wilkerson who serves as a Business Agent for the Ohio & Vicinity Regional Council of Carpenters and as a delegate to that body and is the duly elected President of Local Union 113. Wilkerson exercises duties consistent with his having overall management of Local 113, as its president. He holds himself out to the general public, as well as

the members of Local Union 113 as its president. He has, for example, exercised authority on behalf of Local 113 by responding to inquires of and participating in audits by the U.S. Department of Labor involving Local 113. Wilkerson responds to requests from members to transfer from one local to another. Wilkerson presides at member meetings of Local 113 and signs documents and correspondence on behalf of Local 113. Further as business agent for the Ohio & Vicinity Regional Council of Carpenters Wilkerson represents some 18,000 union members across Ohio addressing their work related concerns, complaints and/or grievances. Again applying the common law principles of agency I conclude and find Wilkerson has, at all times material, been an agent of the Union within the meaning of Section 2(13) of the Act. Members Lawson, Howell, Lamb, Kuhar and Ennis were selected by Union Executive Secretary-Treasure Peto to serve on the "Trial Committee" that decided the internal disciplinary charges brought against West and former Local 113 President McCarthy by Wilkerson. The Trial Committee heard the evidence and gave its decision on November 6, 2010. The Trial Committee was designated by the Union for the purpose of deciding the specific charges filed against West and McCarthy by Wilkerson. I find the members, on November 6, 2010, were acting as duly appointed agents of the Union within the meaning of the Act for the limited purpose of deciding, as directed, the West/Wilkerson charges.

The Government alleges that Graycor, Inc. (Graycor) is an employer within the meaning of Sec. 2(2), (6), and (7) of the Act. This case does not involve an employer-employee relationship. As more fully explained, West never at any time worked for Graycor. Graycor has no connection to this case, except as a vehicle for the Government to establish jurisdiction. In order to establish jurisdiction, it is necessary for the Government to show that the unfair labor practice affects "commerce." See Sections 10(a) and 2(6) and (7) of the Act. This has been interpreted to mean that the Government must establish that an employer having at least some tangential relationship to the case is engaged in commerce. As reflected by the Government's complaint in this case, the longstanding and consistent practice has been to predicate jurisdiction on an employer's operations even in 8(b)(1)(A) cases involving union disputes where the alleged unfair labor practice has no immediate impact whatsoever on the charging party's relationship with an employer. See *Office Employees Local 251 (Sandia National Laboratories)* 331 NLRB 1417, 1445 fn. 1, and other cases cited by the Board. The Union does not dispute that Graycor is a corporation with offices and places of business in various states, including Illinois and Monroe, Ohio, where it is, and has been, engaged in the construction industry providing general contracting, design-build, preconstruction, agency construction management, and construction management services. Nor does it dispute that Graycor in conducting its operations, during the past 12 months, derived gross revenues in excess of \$500,000 and purchased and received at its Illinois and Monroe, Ohio facilities goods valued in excess of \$5,000 directly from points outside the States of Illinois and Ohio. The Union, however, does dispute that West ever worked for Graycor. In fact in its case in chief the Union presented documentary evidence and testimony that West never worked for Graycor. The Government, at the beginning of the trial, took the position West had worked for Graycor at the time of his 2008 unfair labor practice charge against the Union. The Government called West as a rebuttal witness regarding, among other things, his employment with Graycor; however, he testified he never at any time worked for Graycor. West did testify he was qualified to work for Graycor. First, I find that Graycor, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Second, I address whether the Government has established that Graycor, as an employer in commerce, had

at least some incidental or peripheral relationship to the case such as to permit jurisdiction to attach. First, it is clear West never at any time worked for Graycor. There is no clear credible evidence West ever specifically sought referral to Graycor. West, in response to leading questions by the Government on rebuttal, testified his 2008 unfair labor practice charge against the Union concerned the issue of whether he was, had been, or should have been referred to Graycor. The charge, which West withdrew for lack of merit, however, asserts only that Wilkerson threatened Local 113 members with refusal to refer them out of the hiring hall if they exercised their contractual right to leave one job for a better job assignment. I do not find this to indicate West specifically sought referral to Graycor as it related to his 2008 charge. The fact West may, in the past year, have spoken to a couple of superintendents at Graycor about potential superintendent positions does not establish a connection to Graycor with respect to commerce jurisdiction. West testified on rebuttal that Graycor was a signatory employer with the Ohio & Vicinity Regional Council of Carpenters “through a thing called the National Maintenance Agreements which carpenters are a party to.” The Government; however, never clarified exactly what this “thing” was nor did the Government make any attempt to offer copies of any National Maintenance Agreement(s) in support of its contention that such would establish the Union had any type relationship with Graycor or, for that matter, any other employer. I find this fails to establish commerce jurisdiction for this case. Finally, there is no evidence union members are or have been employed at Graycor. Thus I find the Government failed to establish that Graycor has any tangential relationship to the case upon which jurisdiction could attach and as such I recommend the case be dismissed for lack of jurisdiction.

The Government attempted to amend the complaint at the conclusion of the trial, namely, after West acknowledged on rebuttal he never worked for Graycor to allege a new and different employer for jurisdictional purposes. In agreement with the Union, I denied the motion. I concluded it was an untimely attempt in rebuttal to amend the complaint regarding the foundational matter of jurisdiction. It is incumbent upon the Government to establish commerce jurisdiction in its case in chief and not at the rebuttal stage.

Assuming arguendo, the Government, in some manner, established jurisdiction or that commerce jurisdiction is not necessary in 8(b)(1)(A) cases where the underlying issue is access to the Board’s processes, See: *Philadelphia Moving Picture Operator* 159 NLRB 1614 fn.1 (1966), I address the underlying merits of the case.

II. FACTS

The background and underlying facts arise from a purely internal union matter, in part, related to the election in June 2009 of new officers for Local 113 and the transfer of financial documents thereafter. In the June 2009 Local 113 election, President Peter McCarthy was defeated by presidential candidate David Wilkerson and treasurer candidate Claudio Vincent was elected treasurer. Following his defeat, former Local 113 President McCarthy filed a complaint with the International Union and with the United States Department of Labor regarding the election. Thereafter, the Department of Labor advised McCarthy in writing that neither the Department of Labor nor the Office of the Solicitor, Division for Civil Rights and Labor-Management, found any basis to set aside the protested June 4, 2009, election of officers for

Local 113 in Monroe, Ohio. The International Union likewise concluded there were no grounds to set aside the election.

Local 113 is governed by its elected officials and reports to the Ohio & Vicinity Regional Council of Carpenters which in turn is governed by the International Brotherhood of Carpenters. The local unions in Ohio elect delegates to the Ohio & Vicinity Regional Council of Carpenters which conducts quarterly meetings in Columbus, Ohio. It is the Regional Council that negotiates collective-bargaining agreements; hires business agents; and administers the pension, health and welfare funds for the locals.

West testified he was appointed treasurer for Local 113 in March 2005 at a time when Wilkerson was business agent for the Ohio & Vicinity Regional Council of Carpenters. West said he was appointed treasurer because the person he took over from “was convicted by the Labor Department of Embezzlement and Fraud.” West ran for election to the office of treasurer for Local 113 in June 2006 and McCarthy ran for vice president in that same election. Both West and McCarthy were elected. McCarthy became Local 113’s president when President David Chaney resigned in the spring (April or May) 2008. West said McCarthy was Local 113 president at the time he (West) filed his unfair labor practice charge in Case 9-CB-12012 against the Ohio & Vicinity Regional Council of Carpenters. As noted earlier, McCarthy lost his bid to be re-elected in June 2009 and West did not seek reelection. According to Wilkerson, West stopped coming to Local 113 monthly meetings around February 2009. West stated the monthly meetings he missed were excused by President McCarthy because he (West) was working a great distance from Local 113 at the time.

Local 113 President/Union Business Agent Wilkerson testified a controversy arose in July 2009 between Local 113 and West concerning financial records of Local 113 for the years West was treasurer. Wilkerson explained that West’s term as treasurer expired July 2009. The outgoing Local 113 officers were to open the July monthly meeting and swear in the new or re-elected officers. Wilkerson said West did not attend the meeting nor did he readily turn over financial records to Local 113. Wilkerson explained Local 113 continued thereafter to have trouble obtaining financial records from West. Wilkerson said the Union’s constitution covers an officer’s duty to turn over property (records) belonging to the Union. Wilkerson made specific reference to Section 58 of the Union’s constitution which states in part “all officers . . . at the expiration of their term of office . . . shall deliver to their successors all books, papers, moneys and other property in their possession belonging to the United Brotherhood, and shall not be relieved from their bonds or obligations until this law is complied with.”

Charging Party West testified he, at some point, turned over financial records for the most recent year of his tenure as treasurer to Local 113’s designated accounting firm but did not turn over records for the other years because Local 113 had failed to perform a required audit. West specifically requested Local 113 conduct a Section 58 of the Union’s constitution audit of the financial records for his term in office. West’s made reference to the Union’s constitution Section 58 which reads, in part, “A financial officer shall be entitled to have an audit made of his or her financial books and records before turning them over to his or her successor.” West said he filed a grievance seeking to compel Local 113 to conduct an audit. Over a period of time, West sent letters to Local 113 in which he “strongly” suggested Local 113 had not filed their

“Federal LM-3 and their IRS filings that year for which they had records for.” West reminded Local 113; “they were committing Federal crimes by failing to file.”

Local 113 President/Business Agent Wilkerson acknowledged Local 113 was late filing certain reports for the period ending June 30, 2009; but, said it was because the records West turned over to Local 113 for that year were late and not “complied” which required additional work to bring the records into a form the accounting firm could audit. Sometime thereafter, the United States Department of Labor advised Local 113 in writing it had violated LMRDA Section 201(b) because:

Local 113’s Labor Organization Annual Report Form LM-3 for the period ending June 30, 2009 was due September 28, 2009, or 90 days after the end of your organization’s fiscal year. The report was received by the Department of Labor on August 6, 2010.

Wilkerson promised the Department of Labor Local 113 would file future reports within the required 90 days after the end of the local’s fiscal year.

On August 14, 2009, Wilkerson prepared a letter for Local 113 Recording Secretary Joe Bailey to send to West. Wilkerson testified Local 113 membership authorized the letter because West had not turned over to Local 113 the financial books, paperwork and records from his tenure as treasurer. The August 14, 2009 letter follows:

Bryan West
3135 West Street
Weirton, WV 26062
UBC EU-7452-5456

August 14, 2009

Re: Property

Dear Bryan,

As a former member and Treasurer of Local 113 of the United Brotherhood, we extended the time frame in order for you to complete the duties of your office. You had given Vice President Rich Johnston a time frame of two weeks upon receipt of bank statements to have all documents and the quarterly report for the second quarter completed and delivered to Dennis McLaughlin of Clark Schaefer Hackett. You received bank statements as of July 14, 2009 at 3:26pm.

As of this date you haven’t delivered on your part nor have you attempted to contact Local 113 on your intentions.

There was a motion that was carried to send this letter to you by Local 113 stating the violation of the Constitution of the United Brotherhood of Carpenters and Joiners of America. It is as follows:

Property, Section 58. All officers, Business Representatives and assistant Business Representatives, at the expiration of their term of office,.....shall deliver to their successors all books, papers, moneys and other property in their possession belonging to the United Brotherhood....

The Local will give you an additional ten days from the date of this letter to comply with your obligation and have all possessions of this Local turned over to the Trustees by August 24, 2009 so that we may get our financial books in order.

Please comply as soon as possible.

Fraternally,

Joe Bailey
Recording Secretary
Local 113

Wilkerson testified Local 113 had not received the requested information at the time Local 113 authorized the August 2009 letter to West. West testified he did not respond to the August 2009 letter because he had, at that point, turned the records over to an accounting firm designated by the Union.

On January 27, 2010, Local 113 President Wilkerson and Treasurer Claudia Vincent filed internal union charges against former Local 113 President McCarthy and former Treasurer West charging them with "Causing dissension among the members of the UBC" and "Violating the obligation." The charge form requires those filing charges to "[d]escribe all of the facts on which the charge is based." Wilkerson and Vincent attached the following as their description of the charges:

January 18, 2010

On August 14, 2009, a letter from Local 113 was sent to Bryan C. West regarding violation of Section 58 of the Constitution of the United Brotherhood of Carpenters and Joiners of America. This letter instructed Mr. West to turn over all properties belonging to Local 113 to the Trustees by August 24, 2009.

The property in question was all financial records dating back to when Mr. West took office in February 2006 through June 2009. Mr. West did turn over bank statements from July 2008 to June 2009.

The letter instructed Mr. West to turn over all properties of Local 113 to the trustees and no one else. Brother Peter McCarthy (past President of Local 113) interfered with Local trustees when he got with Mr. West and picked up records

and forwarded them to Auditor Clark, Schaeffer and Hackett without the consent of Local 113. Clark, Schaeffer and Hackett contacted David Wilkerson (President of Local 113) and stated that he had the records but couldn't do the audit because of missing information.

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Mr. West transferred from Local 113 to Local 2274 of the Greater Pennsylvania Regional Council of Carpenters approximately June 23, 2009. During the half year prior to Mr. West's transfer, Mr. West was working for a contractor in Greater Pennsylvania's area and didn't report to any Local 113 Executive Board and Regular meetings. Peter McCarthy insisted (without listening to the Executive Board) that Mr. West's absence was excused (from his duties as treasurer) and paid him his one hundred seventy five dollars (\$175.00) per month anyway. The books were left in such a shamble that Local 113 is still trying to get everything in order so they can have the audit completed, a LM3 report completed and a Bond report filed.

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We feel that this ongoing string of events is a violation of the Obligation and has caused much dissension among the members of Carpenters Local 113.

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Witnesses are:

Richard Johnston, Vice President 513-464-7012
Ted Metz, Financial Secretary 513-616-1174
Glen Lakes, Conductor 937-790-0767
Dennis Funk, Warden 937-725-9828

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Respectively submitted,
/s/ David Wilkerson
David Wilkerson

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On March 3, 2010, West and McCarthy were notified in writing of the charges against them and directed to appear before the Executive Committee of the Ohio & Vicinity Regional Counsel of Carpenters on May 7, 2010. West acknowledges there was no mention of his unfair labor practice charge in Case 9-CB-12012 in the internal charges filed against he and McCarthy. West testified the procedure that is followed when charges are filed, is that the Executive Committee decides whether to hear the charges or not. If the Executive Committee decides there could be a violation of the union constitution, the Executive Committee will schedule a pretrial hearing and if appropriate then sets the matter for trial.

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West wrote Executive Secretary-Treasurer Peto on March 17, 2010 to persuade Peto the charges against he and McCarthy had no merit and should be dismissed. West pointed out he had turned over, to an accountant, all treasurer records for the fiscal year ending June 30, 2009 on the first business day of August 2009 in accordance with Section 58 of the Union's constitution. West also noted he had been excused from attending certain meetings of Local 113 in the spring of 2009. West argued, in part, in his letter to Peto that:

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Your employees are presently in a criminal conspiracy to defraud the accountant, the local, the council, the U.S. Department of Labor, and myself and brother McCarthy.

5 These men have undertaken to recover the treasurer's records through deception prior to the completion of the Section 58 audit. They have convinced the E-Board of 113 to approve entering these records into Quick Books and to purchase computers and hire [an] amateur bookkeeper for the data entry. This is the sole basis for the delay in Local 113 filing its board report, LM-3 and IRS 990. The records have now been compromised and tainted and no fair audit can be conducted without the expense of a forensic audit to detect tampering. I have been denied my right to a fair Section 58 audit.

15 West also asserted the internal charges Wilkerson and Vincent filed could be construed as a violation of the antiretaliation provisions of the LMRDA because he and McCarthy had filed challenges related to the most recent Local 113 election of officers. West urged Peto to resolve the charges.

20 West acknowledged he made no mention in his letter to Peto about the unfair labor practice charge he filed in 2008 with the National Labor Relations Board Case 9-CB-12012 as motivation for the internal charges filed against he and McCarthy. He explained he had no way of knowing in March that the charge would later be included in the evidence presented against him by Wilkerson.

25 On March 17, 2010, West wrote Local 113 Recording Secretary Bailey asserting certain members of Local 113's executive board may have committed "several federal and state crimes" related to interfering with the audit process. West advised Local 113, in part, "that these criminal charges are now being brought before the United States Department of Labor, and UBCJA chargeable offenses will be filed with the proper council authorities." West wrote a separate letter to Bailey on March 17, 2010, advising Local 113 that it had failed to timely file certain required documents namely, the U. S. Department of Labor LM-3 report as well as its IRS 990 report and its UBCJA Bond Report. West again asserts that Local 113 has fraudulently obtained and tampered with treasurer records for fiscal year 2009. West suggested Local 113 file its required reports immediately.

35 West, McCarthy, Wilkerson, and Vincent attended the scheduled May 7, 2010 Executive Committee (or Board) meeting of the Ohio & Vicinity Regional Counsel. According to West, the Executive Committee explained they were there to decide if the internal union charges filed against McCarthy and he warranted a trial on the merits by the Union. West testified;

40 "The evidence centered on the custody of the financial records of the Union. Our position was that since an audit had not been arranged or contracted for, that the records would remain, as the Constitution states, in my possession until the audit could be arranged for."

West testified Wilkerson did not present any evidence, at this meeting, of the 2008 unfair labor practice charge Case 9-CB-12012 he (West) had filed against the Union. McCarthy testified that at the May 7, 2010 meeting, "there was no discussion of dissension, other than it was just brought up as a broad statement that there's dissension. But there was serious discussion about the transfer of the financial records of Local 113."

Local 113 President/Union Business Agent Wilkerson testified he summarized his internal union charges for the Executive Committee at the May 7, 2010 meeting stating; "we felt that. . . Bryan West had violated the obligation. And during the time for us to try to get all our records back, he was just prolonging it more and more and more, which was causing dissention among our Local." Wilkerson said no mention was made of the 2008 unfair labor practice charge West had filed.

It appears the Executive Committee did not immediately announce the results of their decision regarding Wilkerson's and Vincent's internal union charges. However, on October 22, 2010, Executive Secretary Treasurer Peto separately notified West and McCarthy that a Trial Committee composed of union members would hear and decide the charges filed against them in trial on November 6, 2010. West and McCarthy were asked to provide a list of witnesses they wished to have notified to testify on their behalf. The notifications advised West and McCarthy they could strike any three names from the Trial Committee list. West exercised that right and struck certain members from the Trial Committee. West said that in preparing for the trial; "we felt the entire case was based on Constitutional violations of the Carpenters Constitution, we based our entire defense on the fact that the charges did not arise to a violations of the Constitution. We prepared blow-ups of the Constitution section pages for the Trial Committee to look at."

Local 113 President/Business Agent Wilkerson testified he did not know how to prepare for the November 6, 2010 trial as he had never before participated in a trial of internal union charges. Wilkerson testified; "they said to bring everything that [I] had. And I started looking through all my boxes and everything pulling out every document that I had for Bryan West and Peter McCarthy". Wilkerson explained, "they" were attorney Stephen Markus and Tony Muskani of the International Union that told him to bring everything he had to the November 6, 2010 trial. Wilkerson testified that included in the 111 pages he gathered for the trial that pertained to West and/or McCarthy was a copy of West's July 17, 2008 unfair labor practice charge, Case 9-CB-12012, filed against the Union along with a copy of National Labor Relations Board Regional Director Gary Muffley's transmittal letter and appearance form. Wilkerson specifically testified, with respect to the unfair labor practice charge, that he, "just stuck it in there, not knowing if I needed it or not." Wilkerson further explained, "what I submitted was everything that I found in boxes at home" that pertained to West and/or McCarthy. The night before the trial Wilkerson assembled copies of the 111 pages he had prepared for the Trial Committee and parties and included them in binder notebooks to distribute at trial.

West and McCarthy were present for and participated in the November 6, 2010 trial. West was given one of the notebooks of documents assembled by Wilkerson that he presented as evidence to the Trial Committee. West testified, "we asked them to actually stop the trial

because the evidence presented was a violation of our rights under Federal Labor Law.” West added, however, that he did not ask that any specific portions of Wilkerson’s evidence not be considered. West testified Wilkerson referenced the Department of Labor and the Labor Board when he spoke to the Trial Committee; however, he said Wilkerson did not reference any particular piece of evidence when he spoke about these two departments or agencies and that Wilkerson spoke of them interchangeably. West added; “he was bringing up evidence against both Mr. McCarthy and myself, both that were brought up before both the Labor Board and the United States Labor Department.” West testified he observed the Trial Committee looking at Wilkerson’s evidence. West stated Wilkerson said “he was trying to show a pattern of – – dissenting activity on the part of myself and Mr. McCarthy”, when he presented his evidence.

McCarthy testified Wilkerson presented “a three-ring binder with label tabs on the end” which was “a tremendous amount of evidence” and included, was a copy of the 2008 unfair labor practice charge West had filed against the Union. McCarthy said that at first they were surprised “that there was evidence being brought” because none of it had been presented at their pretrial meeting. He explained there was a lot to go through in that amount of time. McCarthy said that, “because there were issues of OSHA, there was issues of elections, and the NLRB all was in there”. . . “we pointed out it was inappropriate to bring it in to this body because it’s all Federally protected.” McCarthy testified Wilkerson never mentioned the words the National Labor Relations Board but did use the term Labor Board, but, he was not sure if Wilkerson was referring to the LMRDA or Labor Board. McCarthy said the Trial Committee looked at Wilkerson’s notebook of evidence but he could not see which pages they actually looked at. McCarthy said that when Wilkerson presented his case, he did not go through each page of evidence, that he “skipped different parts.” McCarthy said the complaints he had filed with the International Union as well as the United States Department of Labor, as well as the responses to his complaints, about the conduct of the June 2009 Local 113 presidential election, which he lost, were included in Wilkerson’s notebook of evidence.

Wilkerson testified that when he presented the Trial Committee with his notebook of evidence, he gave them everything he could find in boxes of papers at his home that pertained to West and McCarthy. Wilkerson said he skipped over various pages in his notebook of evidence in presenting his case and added; “at no time was the 2008 unfair labor practice charge ever brought up.” Wilkerson explained; “There was no reason for me to even bring that up, because he dismissed it on his own, it did not bother me.” Wilkerson acknowledged the words “labor board” were mentioned at the trial, but, said it referred to another charge which he asserted was reflected in the transcript of the trial. When asked by the Government if he knew the difference between the Department of Labor Management and the National Labor Relations Board Wilkerson responded; “Ma’am, I’m a carpenter. No I don’t.” Wilkerson specifically testified he never called the Trial Committee’s attention to the unfair labor practice charge at issue; and made no arguments to the Trial Committee not included in the official transcript of the trial. Wilkerson specifically testified that when he prepared the original charges against West and McCarthy, he was not motivated in any way by the fact West had filed an unfair labor practice charge against the Union in 2008.

The parties stipulated to and presented a copy of the transcript of the November 6, 2009 internal union trial.

West was notified in January 2011 that he should be present at the February 12, 2011 meeting of the delegates to the Ohio & Vicinity Regional Council of Carpenters where the verdict on the internal union charges against he and McCarthy would be discussed. West had been notified prior to the February 12, 2011 meeting he had been found guilty on both charges. West said he prepared a statement on both charges to give at the February 12, 2011 meeting. McCarthy made no statement to the delegates; however, West read his statement which follows:

All evidence of dissension presented by brother Wilkerson was all dated at over six month prior to the filing of the initial charges, and not specified in the written charge, violating Section 52 of the UBC Constitution. Brother West had transferred out of Local 113 in mid June 2009, and brother Wilkerson's charges were not filed until January 22, 2010.

Further, union discipline unlawful under section 609 of the LMRDA and Section 8b(1a) of the NLRA, based on written evidence (and entered into the trial transcript) submitted by brother Wilkerson, as the evidence demonstrates the exercise of federally protected rights. The OVRCC can, and will be sued under Section of the LMRDA and UFLP charges by the NLRB for these illegal acts.

Neither Wilkerson nor Vincent spoke to the delegates.

The affirmation of the verdict by the delegates concluded McCarthy was not guilty on both counts but West was guilty on the count of causing dissension among members. He was fined \$1,250. West appealed to the International Union. Collection of the fine has not been sought nor payment made pending the outcome of West's appeal. It is uncertain when the International Union will decide West's appeal.

Local 113 ultimately received its financial records for the years 2006, 2007, and 2008 from Kevin Walsh of the United States Department of Labor.

III. ANALYSIS AND CONCLUSIONS

Section 8(b)(1)(A) of the Act provides it is an unfair labor practice for a labor organization to restrain or coerce employees in the exercise of the rights guaranteed in Section 7. The instant case does not impact West's relationship with his employer; however, it does call into question whether the actions against him impacts an important policy promoted by the Act. Section 8(b)(1)(A) proscribes unacceptable methods of union coercion such as conduct against union members that directly impedes access to the Board's processes. As the Supreme Court noted in *NLRB v. Shipbuilders*, 391 U.S. 418 (1968), "Any coercion used to discourage, retard, or defect. . . access [to the Board] is beyond the legitimate interests of a labor organization." The Board has closely and continually followed that principle, such as in *Office Employees Local 251 (Sandia National Laboratories)* 331 NLRB 1417, 1424, where it states:

Section 8(b)(1)(A) proscribes conduct against union members that directly impedes access to the Board's process. Thus, as in *Shipbuilders*, supra. 391 U.S.

418 (1968), a union may not enforce rules that unduly hamper the ability of its members to bring a matter to the Board for consideration.

In the instant case, the Union makes no claim it had a legal right under 8(b)(1)(A) to take action against West because he filed his 2008 charge against the Union, rather it asserts West was convicted of causing dissension among its members and fined \$1250 for legitimate reasons, namely that he failed to properly return financial records, property of the Union, to the Union. Since the Union's assertions, supporting evidence and testimony places the motive, for its actions taken against West, in issue the Union contends it is necessary that this case be analyzed under *Wright Line*, 251 NLRB 1083 (1980) enfd. 662F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The Union's assertion that a *Wright Line* analysis is appropriate in this case is correct. *Service Workers (Kaiser Foundation Health Plan)* 349 NLRB 753, 756 (2007).

The Government, in its posttrial brief, points out the complaint does not allege unlawful motivation in the initial filing of the dissension charge against West but that the 8(b)(1)(A) violation occurred when Local 113 President/Union Business Agent Wilkerson included West's 2008 unfair labor practice charge against the Union as evidence in his notebooks of evidence submitted to the union Trial Committee on November 6, 2010.

The Government must make a prima facie showing that the filing by West of his 2008 unfair labor practice charge with the Board against the Union, although later withdrawn for lack of merit, was a motivating factor in the Trial Committee's decision to find West guilty of dissension and imposing a \$1250 fine against him. If the Government meets that burden, the Union must then prove its affirmative defense that it would have undertaken the same action, finding West guilty of dissension and imposing a \$1250 fine, even if his 2008 charge had not been filed.

There is no dispute West filed an unfair labor practice charge against the Union in Case 9-CB-12012 on July 17, 2008. There is likewise no dispute Local 113 President/Business Agent Wilkerson included the 2008 unfair labor practice charge in the notebook of materials he gathered for, and presented to, the Trial Committee at the November 6, 2010 internal union trial of West and McCarthy. The materials Wilkerson presented the trial committee were presented in support of Wilkerson's and Treasurer Vincent's charges against West and McCarthy of "Causing dissension among members of the UBC" and "violating the obligation." West was found guilty of causing dissension and fined \$1250. I find the Government met its burden of establishing a prima facie showing sufficient to support an inference that the internal union disciplinary charges filed against West by Wilkerson were motivated at least in part as retaliation against West for having filed his 2008 unfair labor practice charge against the Union.

Did the Union show it would have taken the same action regardless of the protected activity (West's filing an unfair labor practice charge against the Union) involved? I am persuaded the Union met its burden. The facts establish this case, from its inception to conclusion, was always about Local 113's financial records and nothing else. It is clear from the detailed and lengthy chronology of events, set forth elsewhere, that a struggle, controversy or issue arose in July 2009 between Local 113 and West over financial records for the years West was treasurer. West's term as treasurer expired and newly elected treasurer Vincent's term

began in July 2009. Vincent, Wilkerson and Local 113 membership were persuaded the Union's constitution required West to immediately turn over the financial records of Local 113 that he possessed. West, and to a degree, McCarthy, were just as sure the Union's constitution did not call for the financial records to be surrendered until an audit of the records was made. It is clear the financial records in question were needed by Local 113 to file certain mandatory Department of Labor and Internal Revenue Service reports. In fact, West sent a number of letters to Local 113 reminding the local it needed to file these reports and suggested it was a crime not to do so. Local 113 contended that even what records West gave to the auditor for his most recent year as Treasurer were not compiled in a form that could be audited. This was always a dispute about records. Local 113 was late filing certain required reports. Local 113's detailed letter to West on August 14, 2009 again addressed the Local's need for the financial records West had and even providing West additional time to provide the records. The internal charges filed on January 27, 2010 by Wilkerson and Vincent addressed only the financial records, with some comments about West's attendance at Local 113 meetings, which attendance issues are not relevant. Again it is simply about the financial records.

On March 3, 2010, West and McCarthy were directed to appear on May 7, 2010 before the Union's Executive Committee, at which time it would be decided whether to refer the matter to trial. On March 17, 2010, West wrote Union Executive Secretary-Treasure Peto stating he had turned over certain financial records to Local 113 and was seeking an audit with respect to the other records and asked Peto to dismiss the internal union charges against him. Again the facts demonstrate this was simply about financial records.

West and McCarthy appeared at the May 7, 2010 meeting with the Executive Committee and West testified the evidence "centered on the custody of the financial records." McCarthy testified there was no real discussion of dissension but there was "serious discussion about the transfer of the financial records of Local 113." Wilkerson's position at the May 7, 2010 meeting was that West had violated his "obligation" to return Local 113's records and his failure was causing "dissension" among Local 113 members. No mention or discussion of the unfair labor practice charge West has filed in 2008 was had. The parties were notified in October 2010 to prepare for trial before the Union's Trial Committee on November 6, 2010, covering the internal union charges. West and McCarthy attended. West felt the entire case was based on the Union's constitution and that his and McCarthy's defense was the charges did not rise to the level of a violation of the Union's constitution.

There is no dispute that West was given a copy of the notebook of evidence Wilkerson presented to the Trial Committee on November 6 and included, therein, was West's 2008 unfair labor practice charge which he filed against the Union. Wilkerson credibly testified he did not know how to prepare for the trial as it was his first one involving internal union charges. Wilkerson sought advice on how to prepare and was told to bring everything he had that involved West and McCarthy. Wilkerson searched boxes of union documents stored at his home and among the 111 pages he collected and presented to the Trial Committee was the 2008 unfair labor practice charge West filed. Wilkerson stated he "just stuck it in there" not knowing if he needed it or not. I credit Wilkerson's testimony, as set forth above, based not only on his demeanor but also because his testimony is supported by the chronology of events in the case including the verbatim transcript of the November 6, 2010 trial. Wilkerson skipped over various

pages in his notebook of evidence in presenting his case to the Trial Committee and credibly testified that “at no time was the 2008 unfair labor practice charge ever brought up.” Wilkerson explained there was no reason for him to bring it up, “because he [West] dismissed it on his own” and Wilkerson said it did not bother him. I note, West had filed the 2008 charge when McCarthy, not Wilkerson, was president of Local 113. In summary, I am persuaded the 2008 charge was not specifically discussed at the November 6, 2010 trial. In light of all the above, I am unwilling to conclude that the mere fact the 2008 unfair labor practice charge West filed was included in the notebook of evidence warrants a finding of a violation of the Act. I find on the totality of the evidence, the Union established it would have taken the same action it did even in the absence of the 2008 unfair labor practice charge being included in the notebook of evidence.

I am persuaded West’s testimony he and McCarthy “asked them to actually stop the trial because the evidence presented was a violation [their] rights under Federal Labor Law”; or, that he stated Wilkerson “was bringing up evidence against both Mr. McCarthy and myself, both that were brought up before the Labor Board and the United States Labor Department” does not require a different conclusion than I have reached. Although, West stated Wilkerson referenced both the Department of Labor and Labor Board to the trial he acknowledged Wilkerson used the terms interchangeably. McCarthy specifically noted Wilkerson never mentioned the words National Labor Relations Board at the trial but rather said Labor Board. McCarthy acknowledged he was not sure if Wilkerson was referring to “the LMRDA or Labor Board.” McCarthy also noted that when Wilkerson presented evidence to the Trial Committee, he did not go through each page of evidence but rather “skipped different parts.” Wilkerson declared he was a carpenter and did not know the difference between the Department of Labor and the Labor Board. Thus, all the above persuades me the inclusion of the 2008 unfair labor practice charge in the Union’s notebook of evidence was not unlawfully motivated nor for that matter even specifically discussed.

The fact West read a statement at the Ohio & Vicinity Regional Council of Carpenter delegates meeting in February 2011 that his discipline was specifically based on the unfair labor practice charge he had filed does not warrant a different conclusion than the one I reach. First, his statement does not establish that fact and second, it comes after he had already been found guilty at his November 6, 2009 trial.

In summary, and in addition to my finding, the Government failed to establish the Board’s jurisdiction in this case, I conclude and find on the merits, the Union did not violate the Act in any manner alleged in the complaint. I shall, therefore, recommend dismissal of the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

³ If no exceptions are filed as provided by Section 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

It is recommended that the complaint be dismissed.

Dated Washington, D.C., September 22, 2011.

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William N. Cates
Associate Chief Judge